UNITED STATES DISTRICT COURT

DISTRICT OF MAINE

DEBRA SAWYER, et al.,	***)***	
	)	
Plaintiffs	***)***	
	)	
v.	***)***	***Docket No. 97-396-P-C***
	)	
TOWN OF GORHAM, et al.,	***)***	
	)	
Defendants	***)***	

RECOMMENDED DECISION ON DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

The plaintiffs in this action, husband and wife and residents of Gorham, Maine at all relevant times, assert claims under 42 U.S.C. § 1983 and various state laws. The defendants are the Town of Gorham, Maine, and four of its police officers: Sergeant Christopher Sanborn, Sergeant Robert Mailman, Officer Daniel Young, and Officer Robert Henckel. They have moved for summary judgment on all claims. I recommend that the motion be granted in part and denied in part.

I. Summary Judgment Standards

Summary judgment is appropriate only if "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). "In this regard, 'material' means that a contested fact has the potential to change the outcome of the suit under the governing law if the dispute is resolved favorably to the nonmovant. By like token,

'genuine' means that 'the evidence about the fact is such that a reasonable jury could resolve the point in favor of the nonmoving party . . . .'" *McCarthy v. Northwest Airlines, Inc.*, 56 F.3d 313, 315 (1st Cir. 1995) (citations omitted). The party moving for summary judgment must demonstrate an absence of evidence to support the nonmoving party's case. *Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986). In determining whether this burden is met, the court must view the record in the light most favorable to the nonmoving party and give that party the benefit of all reasonable inferences in its favor. *Cadle Co. v. Hayes*, 116 F.3d 957, 959 (1st Cir. 1997). Once the moving party has made a preliminary showing that no genuine issue of material fact exists, "the nonmovant must contradict the showing by pointing to specific facts demonstrating that there is, indeed, a trialworthy issue." *National Amusements, Inc. v. Town of Dedham*, 43 F.3d 731, 735 (1st Cir. 1995) (citing *Celotex*, 477 U.S. at 324); Fed. R. Civ. P. 56(e). "This is especially true in respect to claims or issues on which the nonmovant bears the burden of proof." *International Ass'n of Machinists & Aerospace Workers v. Winship Green Nursing Ctr.*, 103 F.3d 196, 200 (1st Cir. 1996) (citations omitted).

II. Factual Background

The following undisputed facts are properly supported in the summary judgment record.[1] At

[1] The plaintiffs have not contested any of the statements included in the Defendants' Statement of Uncontroverted Facts ("Defendants' SMF") (Docket No. 7), but instead have filed their own Statement of Facts ("Plaintiffs' SMF") (Docket No.10) that, contrary to the requirements of Local Rule 56, simply recites facts without specific mention of those contained in the Defendants' SMF. Local Rule 56 provides, in relevant part, that "[t]he papers opposing a motion for summary judgment shall be accompanied by a separate, short and concise statement of material facts, supported by appropriate record citations, as to which it is contended that there exist a genuine issue to be tried. All material facts set forth in the statement required to be served by the moving party, if supported by appropriate record citations, will be deemed to be admitted unless properly controverted by the statement required to be served by the opposing party." The opposing party should make clear what material facts asserted by the moving party are disputed. The court should (continued...)

the time of the incidents giving rise to this action, the plaintiffs resided at 27B Water Street in Gorham, an apartment on the second and third floors of a duplex building. Affidavit of Lisa S. McLaughlin ("McLaughlin Aff.") (Exh. G to Defendants' SMF) ¶ 1. During this time, Elizabeth Sullivan lived at 27A Water Street, an apartment on the first floor under the Sawyer apartment, Affidavit of Elizabeth Sullivan (Exh. A to Plaintiffs' SMF) ¶ 1, and Lisa McLaughlin (Boynton) lived at 25 Water Street, a three-floor apartment on the other side of the duplex, McLaughlin Aff. ¶ 1. Katrina Berrill lived at 17 Glenwood Avenue in Gorham, directly behind the 25-27 Water Street duplex. Affidavit of Katrina Berrill ("Berrill Aff.") (Exh. F to Defendants' SMF) ¶¶ 1-2. During 1995, 1996 and 1997 Berrill and McLaughlin made numerous calls to the Gorham police to complain about the barking of dogs owned by the plaintiffs. *Id*. ¶ 2; McLaughlin Aff. ¶¶ 2, 5. McLaughlin also made numerous complaints to the police about the plaintiffs for other reasons. McLaughlin Aff. ¶ 5. The plaintiffs had also called the police to complain about their neighbors. Affidavit of Ronald Shepard ("Shepard Aff.") (Exh. A to Defendants' SMF) ¶ 4.

On August 3, 1995 at approximately 9:30 p.m. McLaughlin called the police to complain of dogs barking in the apartment at 27B Water Street. McLaughlin Aff. ¶ 2. Defendant Young was sent to respond. Affidavit of Daniel Young ("Young Aff.") (Exh. B to Defendants' SMF) ¶ 2. Young spoke with McLaughlin upon arriving and could hear a dog barking inside 27B Water Street. *Id*. ¶ 3. He was not familiar with the building or the individuals involved. *Id*. He shined his flashlight through the window in the door of 27B and saw a staircase. *Id*. The door was unlocked.

---

[1](...continued)
not have to compare the two statements in detail to discern which facts, if any, are in dispute. Here, the entries in the Defendants' SMF will be deemed to have been admitted unless it is clear that the plaintiffs have made a properly supported assertion to the contrary in their Statement.

Id. He took one step inside and saw a dog growling at him from the second floor landing. *Id.* McLaughlin advised Young that there was a rear entrance to the apartment. *Id.* ¶ 4; McLaughlin Aff. ¶ 2. Young went to the back of the building, climbed the stairs to the back door and left a written warning in the door. Young Aff. ¶ 4. Sullivan states that she was standing at her kitchen sink washing dishes that night and after a period of ten minutes saw Young coming down the back stairs from the plaintiffs' apartment. Sullivan Aff. ¶ 2. She had not seen him go up the stairs. *Id.* She spoke with Young at the time, and he told her he had checked to see whether the dog had food and water. *Id.*

Upon their return that night, the plaintiffs were informed by Sullivan about Young's visit. Deposition of Debra A. Sawyer ("Debra S. Dep.") at 20. Debra Sawyer concluded that Young had been inside her apartment, called the Gorham police department and spoke to defendant Sanborn. *Id.* at 20. Sanborn came to 27B Water Street within an hour, apologized for Young's unauthorized entry, and offered Debra Sawyer the opportunity to file a formal complaint, which she declined. Debra S. Dep. at 20-21.

The defendant town adopted a Standard Operating Procedure relating to domestic violence cases effective January 1, 1996. Shepard Aff. ¶ 3 & Exh. 1 thereto.

On February 4, 1996 McLaughlin called the police to complain about banging on the wall between her apartment and the plaintiffs' apartment. McLaughlin Aff. ¶ 3. Officer Foley and defendant Henckel responded to the call at around 1:00 a.m. Affidavit of Robert Henckel ("Henckel Aff.") (Exh. E to Defendants' SMF) ¶ 4. They knocked repeatedly on the plaintiffs' front door but received no response. *Id.* Defendant Mailman arrived and spoke to McLaughlin. *Id.*; McLaughlin Aff. ¶ 3. Mailman then knocked loudly on the plaintiffs' front door. Henckel Aff. ¶ 4. Mailman

did not see any doorbell that he could ring. Affidavit of Robert Mailman ("Mailman Aff.") (Exh. D to Defendants' SMF) ¶ 3. Debra Sawyer came to the door and yelled repeatedly at Mailman. *Id.*; Henckel Aff. ¶ 4. No arrests were made or summonses issued as a result of this incident. Deposition of David Sawyer ("David S. Dep.") at 26.

Also in February 1996 David Sawyer was arrested by a Gorham police officer, not among the named defendants in this action, for operating a motor vehicle after his license to do so was suspended. Young Aff. ¶ 6; David S. Dep. at 30-32. This incident took place around 2:00 a.m. Debra S. Dep. at 34. The officer who approached the plaintiffs' car called David Sawyer by name and told him that his license was under suspension as he was walking up to the car, but neither of the plaintiffs knew the officer. Debra S. Dep. at 33. David Sawyer was handcuffed, taken to the Gorham Police Department, booked and released without payment of bail. David S. Dep. at 34-35. Debra Sawyer was "made to get out of the car," and not allowed to take her baby out of the car seat. Debra S. Dep. at 34-35. The police offered to take her and her children home. *Id*. at 34. At some point an unidentified person responded to Debra Sawyer's statement that the arrest was a setup by saying "that's what you get when you mess with the police." *Id*. at 35. As he was walking home from the police station, David Sawyer was approached by another Gorham police officer who, according to David, "asked me if I knew anything about drugs, he could take care of the ticket for me." David S. Dep. at 35. David Sawyer pleaded guilty to the charge of operating after suspension and paid a fine. *Id*. at 32-33.

On April 27, 1996 defendant Henckel was dispatched in response to a complaint from McLaughlin that one of the plaintiffs' dogs had bitten her daughter. Henckel Aff. ¶ 3. Henckel observed a scratch on the child's cheek. *Id.* He asked the plaintiffs for confirmation that the dogs

had been vaccinated for rabies. *Id*. Debra Sawyer stated that the dogs had received rabies shots but was unable to produce any record of that fact. *Id.* The incident took place on a Saturday. *Id*. Debra Sawyer stated that she would provide records from her veterinarian on the following Monday. *Id.* Henckel responded that if she did not do so, state law required that the dogs be quarantined. *Id.* He also stated that, if the dogs had not been vaccinated and McLaughlin wanted "to push this issue," an order to destroy the dogs could result. *Id*. Henckel was later informed that the dogs had not been vaccinated, and they were quarantined in the plaintiffs' apartment until they obtained the shots. *Id*. At this time, a "cease harassment order" against Debra Sawyer that had been obtained by McLaughlin was in effect. *Id*.; Debra S. Dep. at 13-14; McLaughlin Aff. ¶ 5.

In the fall of 1996 Debra Sawyer called the Gorham police to report that her neighbor's dog was running loose and chasing children. Debra S. Dep. at 36, 39. On the plaintiffs' police scanner, she and David Sawyer then heard a female dispatcher call an officer to respond to the complaint and refer to Debra Sawyer as "just an f'n whore anyways." *Id*. David Sawyer immediately called the dispatcher by telephone and the dispatcher "denied everything." David S. Dep. at 37-38.

On May 25, 1997 defendant Young was dispatched to the plaintiffs' residence in response to a complaint about barking dogs. Young Aff. ¶ 5. Upon arrival he saw and heard two dogs tied in the yard and barking. *Id.* He spoke with David Sawyer, who admitted that he had received a written warning earlier that week from another Gorham police officer concerning the barking of his dogs. *Id*. Young then issued a summons to David Sawyer for violation of a town ordinance concerning barking dogs. *Id*. The charge was eventually dismissed because Young failed to note on the summons that the charge arose under the ordinance rather than state law. *Id.*

On July 20, 1997 Berrill reported to police that she had heard very loud sounds of an

altercation coming from the building in which the plaintiffs resided, including "a child crying in a hysterical manner" and a female voice yelling "Don't do it, David. Don't do it." Berrill Aff. ¶ 4. Defendants Sanborn , Henckel and Young were dispatched to the scene at approximately 9:40 p.m. Young Aff. ¶ 7. It is standard operating procedure for the Gorham police department to send two or three officers to a domestic violence call. Gorham Police Department Standard Operating Procedure, Exh.1 to Shepard Aff., at IV.B.1. The plaintiffs were yelling at their son, and he was yelling back and slamming doors, before the police arrived. Debra S. Dep. at 61-62; David S. Dep. at 68. Henckel remained outside at the front of the building. Henckel Aff. ¶ 6. Young and Sanborn went to the entrance to the plaintiffs' apartment at the rear. Young Aff. ¶ 8. Debra Sawyer answered the door when Young knocked. *Id.* Young stepped into the kitchen and Sanborn remained in the doorway. *Id.*

Debra Sawyer told Young and Sanborn that she had been arguing with her son, Tim. Debra S. Dep. at 63. Young told Debra Sawyer that the officers needed to speak with her son. Young Aff. ¶ 9. Tim was in the bathroom at that time. *Id.* Debra Sawyer told the officers to step out of her kitchen and onto the back porch. *Id.*; Debra S. Dep. at 64; Sanborn Aff. ¶ 5. Sanborn decided that the officers would not do so until they had spoken to Tim, and this information was conveyed to Debra Sawyer. Sanborn Aff. ¶ 5; Young Aff. ¶ 9. Debra Sawyer repeatedly told the officers to leave. Sanborn Aff. ¶ 5; Young Aff. ¶ 8; Debra S. Dep. at 63-65. Tim Sawyer eventually came out of the bathroom and spoke with the officers. Young Aff. ¶ 10; Debra S. Dep. at 64-65. Sanborn and Young had their hands on their gun holsters while they talked with Debra and Tim. Debra S. Dep. at 68-69. After talking with Tim, Young informed Debra Sawyer that the officers would leave as soon as he had "check[ed] [her] records for being wanted." *Id.* at 65.

When Young and Sanborn left the apartment, David Sawyer followed them to the front of the house, "to ask [them] [d]o I have a right to yell at my son without having police officers here." David S. Dep. at 68. While David Sawyer was speaking with Henckel, Henckel Aff. ¶ 6, Debra Sawyer also went outside and asked Sanborn who had made the complaint, Debra S. Dep. at 66. Sanborn told her "I think you need to go in and stay in for the night." *Id.* at 67. Tim came out of the house and made oinking noises at the police as they left. *Id*. at 68.

On July 30, 1997 Debra Sawyer called the Gorham police department to report that her brother-in-law and landlord, Jeffrey Sawyer, was at her residence in violation of a protective order that she had obtained against him. Debra S. Dep. at 42-43, 45-46; Henckel Aff. ¶ 7. Henckel learned that the sheriff's department had not yet served the protective order on Jeffrey Sawyer. *Id.* Henckel and officer Drown went to the plaintiffs' residence. Sanborn Aff. ¶ 7. Henckel showed a copy of the order to Jeffrey Sawyer, who agreed to leave. Henckel Aff. ¶ 7. The officers asked Debra Sawyer what she wanted them to do and she told them "now that he believes there's an order, I don't think I'll have that much of a problem but I want him out of here." Debra S. Dep. at 47.

In August 1997 Debra Sawyer requested copies of certain documents from the Gorham police department. Exh. F to Plaintiffs' SMF at 1; Shepard Aff. ¶ 9. Debra Sawyer paid for the copies with a check dated August 29, 1997. Exh. F to Plaintiff's SMF at 3. The town attempted to cash the check before August 29, 1997 and it was returned for insufficient funds. *Id*. at 1. The town demanded that the check be honored by September 5, 1997. *Id.* Police Chief Shepard recommended that the town accept the face amount due on the check and waive the usual fee for bounced checks. Shepard Aff. ¶¶ 1, 9. Debra Sawyer paid that amount in cash. Debra S. Dep. at 55.

At some time before this action was filed, the plaintiffs met with Chief Shepard. Shepard

Aff. ¶ 5; David S. Dep. at 40. At this meeting, the plaintiffs "went through everything that [the police] were doing." David S. Dep. at 40. Shepard gave the plaintiffs a written complaint form and told them that a complaint must be in writing in order to be investigated under the terms of the town's collective bargaining agreement with the officers. Shepard Aff. ¶ 5. The plaintiffs did not file a written complaint and did not contact Shepard to follow up on the meeting. *Id*.; David S. Dep. at 41.

The defendant town received the plaintiffs' notice of claim on October 22, 1997. Affidavit of D. Brenda Caldwell (Exh. J to Defendants' SMF) ¶ 2. At all relevant times, the defendant town had insurance coverage only for liabilities falling outside the immunities granted to a municipality under the Maine Tort Claims Act. Affidavit of David O. Cole (Exh. K to Defendants' SMF) ¶ ¶ 2-4.[2]

III. Discussion

The complaint makes the following claims against all of the defendants: violation of the plaintiffs' due process rights under the Fifth and Fourteenth Amendments to the United States Constitution, pursuant to 42 U.S.C. § 1983 (Count I); violation of the plaintiffs' rights under the Fourth Amendment to the United States Constitution, pursuant to 42 U.S.C. § 1983 (Count II); violation of the plaintiffs' rights under Article 1, Sections 1 and 19 of the Maine Constitution, pursuant to 5 M.R.S.A. § 4683 (Count V); violation of the plaintiffs' rights under Article 1, Sections 5 and 19 of the Maine Constitution, pursuant to 5 M.R.S.A. § 4683 (Count VI); invasion of privacy

[2] The plaintiffs have also submitted the affidavit of their son, Timothy, in support of their allegations that he was "repeatedly harassed by the Gorham Police Department" between February 1996 and July 1997. Affidavit of Timothy Sawyer, Exh. E(1) to Plaintiffs' SMF, ¶ 2. Timothy is not a party to this action and therefore his claims will not be considered further.

(Count VIII); assault (Count IX); false imprisonment (Count X); abuse of process (Count XI); defamation (Count XII); and punitive damages (Count XIII). The following claims appear to be asserted only against the Town of Gorham, although in each case the demand is for joint and several relief against all defendants: custom or policy of deliberate indifference to constitutional violations by its police officers, pursuant to 42 U.S.C. § 1983 (Count III); gross negligence in supervision, hiring and training of police officers, pursuant to 42 U.S.C. § 1983 (Count IV); and negligence in failing to supervise the actions of the individual defendants, pursuant to the Maine Tort Claims Act (Count VII). None of these three claims could be raised against any of the individual defendants by their terms, and none will be considered to have been raised against any named defendant other than the town. There is also a Count XIV, which merely seeks a specific amount of damages.

A. The State-Law Tort Claims

1. The Maine Tort Claims Act. The Maine Tort Claims Act, 14 M.R.S.A. § 8101 *et seq*., provides that notice of claims against a governmental entity must be filed with the entity within 180 days after the claim or cause of action accrues. 14 M.R.S.A. § 8107(1). In order to maintain such a claim, a plaintiff must comply with the statutory notice requirements. *Smith v. Voisine*, 650 A.2d 1350, 1352 (Me. 1994). Here, the notice was served on the defendant town on October 22, 1997. Therefore, any incidents occurring before April 25, 1997 could not provide the basis for a claim against the town. *Cushman v. Tilton*, 652 A.2d 650, 651 (Me. 1995). Accordingly, only the May 25, 1997 summons for barking dogs, the July 20, 1997 response to the report of domestic violence, the July 30, 1997 complaint of an alleged violation by Jeffrey Sawyer of a protective order, and the August 1997 cashing of the post-dated check provide timely bases for the claim in Count VIII that the town defendant negligently supervised the actions of its employees, resulting in damage for which the

plaintiffs may recover under the Maine Tort Claims Act.

Under 14 M.R.S.A. § 8103, all governmental entities are immune from suit on any and all tort claims other than those for which immunity is removed by the Tort Claims Act. In addition, 14 M.R.S.A. § 8104-B(3) provides that a governmental entity is immune from any claims that result from "[p]erforming or failing to perform a discretionary function or duty, whether or not the discretion is abused and whether or not any statute, charter, ordinance, order, resolution or policy under which the discretionary function or duty is performed is valid or invalid." A governmental entity's immunity is waived only when the entity procures insurance coverage for such claims. 14 M.R.S.A. § 8116. The town defendant has submitted uncontroverted evidence that it has not done so. The timely acts alleged to have been undertaken by town employees do not fit within any of the exceptions to municipal immunity set forth at 14 M.R.S.A. § 8104-A. It therefore appears that the town defendant is entitled to judgment on Count VIII of the complaint. *Comfort v. Town of Pittsfield*, 924 F. Supp. 1219, 1237 (D. Me. 1996).

The plaintiffs argue that the entry into their home in response to the domestic violence call in July 1997 was clearly an unlawful trespass and therefore does not enjoy immunity as a discretionary act. Plaintiffs' Objection and Memorandum of Law in Response to Defendant Town of Gorham, et al.'s Motion for Summary Judgment ("Plaintiffs' Memorandum") (Docket No. 11) at 18. The plaintiffs do not address any of the other timely incidents in connection with this issue. The plaintiffs' argument does not address the town's general immunity and the fact that none of the exceptions listed in section 8104-A encompass the July 1997 incident. *See Adriance v. Town of Standish*, 687 A.2d 238, 240 (Me. 1996) (discretionary immunity under Tort Claims Act only addressed if incident falls within exception under section 8104-A). The defendant town is entitled

to summary judgment on Count VIII of the complaint.

2. Claims Asserted Against Individual Defendants. The lack of timely notice to the town defendant as required by the Maine Tort Claims Act also serves as a bar to claims against individual employees of the town. *See Kakitis v. Perry*, 659 A.2d 852, 853-54 (Me. 1995) (notice to governmental entity need not list names of individual employees against whom lawsuit is later brought). Accordingly, any claims against the individual defendants may be based only upon the four timely incidents listed above.

None of these incidents provides any factual basis for claims of defamation (Count XII), *Rippett v. Bemis*, 672 A.2d 82, 86 (Me. 1996) (elements of defamation include a false and defamatory statement concerning another, unprivileged publication to a third party, fault amounting to at least negligence and existence of special harm caused by publication) or abuse of process (Count XI), *Pepperell Trust Co. v. Mountain Heir Fin. Corp*., 1998 ME 46 ¶ 14 n.8, 708 A.2d 651, 655 n.8 (Me. 1998) (abuse of process is allegedly improper use of individual legal procedures after a suit has been properly filed). *See also Dall v. Caron*, 628 A.2d 117, 119 (Me. 1993) (police officers absolutely immune under Tort Claims Act from malicious prosecution claims). All defendants are therefore entitled to judgment on Counts XI and XII.

The defendants contend that they are entitled to immunity on all of the plaintiffs' state-law tort claims under 14 M.R.S.A. § 8111(1)(C), which provides that employees of governmental entities are absolutely immune from personal civil liability for "[p]erforming or failing to perform any discretionary function or duty, whether or not the discretion is abused; and whether or not any statute, charter, ordinance, order, resolution, rule or resolve under which the discretionary function is performed is valid." The plaintiffs limit their response to this argument to the incidents in

February 1996 (the wall-banging complaint) and July 1997 (the domestic violence call).[3] Plaintiffs' Memorandum at 18. The Tort Claims Act also provides immunity for any intentional act or omission within the course and scope of the actor's employment so long as the act or omission is not found to have been in bad faith. 14 M.R.S.A. § 8111(1)(E). The latter provision does not modify the discretionary act immunity provided by section 8111(1)(C); it only comes into play if that subsection of the statute is not applicable. *Dall*, 628 A.2d at 119.

The absolute immunity provided by the Tort Claims Act is available so long as the contested action is essential to the realization or accomplishment of a basic governmental policy, program or objective and the defendant's conduct did not clearly exceed, as a matter of law, the scope of any discretion he may have possessed in his official capacity as a police officer. *Lyons v. City of Lewiston*, 666 A.2d 95, 101 (Me. 1995). In *Maguire v. Municipality of Old Orchard Beach*, 783 F. Supp. 1475 (D. Me. 1992), the plaintiff was stopped by a police officer while driving, taken from his car, restrained and taken to the hospital by ambulance. *Id.* at 1477. His vehicle was towed and the same officer told the towing company personnel not to release the vehicle without proof of ownership. *Id*. at 1478. The vehicle was released to the plaintiff without proof of ownership; when the officer learned this, he had the vehicle towed again and refused to release it to the plaintiff. *Id.* A few days later, a second officer went to the plaintiff's house in response to a report that the plaintiff had threatened to take action against the police, entered without the plaintiff's permission and without a warrant, put the plaintiff in an ambulance and restrained him there. *Id*. at 1478-79. This court entered summary judgment in favor of these two officers upon their claim of discretionary act immunity under the Tort Claims Act. *Id*. at 1487. These acts appear to be considerably more

[3] The plaintiffs also rely on the August 1995 incident, which is time-barred.

extensive in their direct impact upon the plaintiff than any of the timely acts alleged against the individual defendants here. Each of the contested actions was essential to the accomplishment of a basic governmental policy or objective. As a matter of law, the officers' alleged actions did not clearly exceed the scope of the discretion they possessed as police officers.[4] *See generally Polley v. Atwell*, 581 A.2d 410, 413 (Me. 1990) (listing factors used in determining whether action constitutes a discretionary function); *Hegarty v. Somerset County*, 848 F. Supp. 257, 269-70 (D. Me. 1994) (officers who shot and killed suspect in course of warrantless arrest did not clearly exceed scope of any discretion they could have possessed). Because the individual defendants are absolutely immune, no liability for the town may be predicated upon their behavior. The defendants are entitled to summary judgment on Counts VIII, IX, and X.[5]

---

[4] Of course, the check cashing incident, while timely, did not involve any of the individual defendants. To the extent that municipal liability is predicated on that incident, the immunity provided to the town by section 8103 is applicable, and summary judgment is appropriate.

[5] Even if the individual defendants were not entitled to discretionary function immunity on these claims, they would be entitled to summary judgment on at least two of the three counts because the summary judgment record fails to establish a substantive basis for those claims. The plaintiffs assert that the assault occurred when defendants Young and Sanborn held their hands on their guns while in the plaintiffs' apartment on July 20, 1997. Plaintiffs' Memorandum at 18. Under Maine law, the intentional tort of assault occurs when "a person intentionally or recklessly places another in fear of imminent harmful or offensive contact." *Rowe v. Bennett*, 514 A.2d 802, 806 n.3 (Me. 1986). Nothing in the plaintiffs' statement of material facts suggests that they were placed in such fear. They further argue that they have "properly plead" a claim for false imprisonment because these officers entered the apartment illegally on that occasion. Plaintiffs' Memorandum at 18. Aside from the fact that proper pleading is not the issue when a motion for summary judgment is before the court, the allegation that the officers were in the plaintiffs' apartment without their consent does not necessarily mean that the plaintiffs were detained or restrained unlawfully and against their will. *Nadeau v. State*, 395 A.2d 107, 116 (Me. 1978). Again, the plaintiffs' statement of material facts does not include any support for the elements of this claim. Thus, the defendants are also entitled to summary judgment on the substance of the claims in Counts IX and X of the complaint.

B. The Federal Claims

Counts I and II assert claims against all defendants under 42 U.S.C. § 1983, and Counts III and IV assert such claims against the town defendant. The defendants assert a defense of qualified immunity to all of these claims.

1. Claims Against All Defendants. The Supreme Court has recently directed federal courts to determine whether a plaintiff has alleged the deprivation of a constitutional right under section 1983 at all before evaluating a defendant's claim of qualified immunity. *County of Sacramento v. Lewis*, 118 S.Ct. 1708, 1714 n.5 (1998). In this case, Count I alleges violations of the plaintiffs' rights to liberty and due process of law under the Fifth and Fourteenth Amendments to the United States Constitution. The Supreme Court's decision in *County of Sacramento* is dispositive of this claim.

In that case, police officers pursued two youths on a motorcycle, the driver of which had failed to stop in response to an officer's command after he was observed traveling at a high rate of speed. *Id*. at 1712. The chase, at speeds up to 100 miles per hour, ended when the motorcycle tipped over as the driver attempted a sharp left turn. *Id*. The pursuing officer was unable to stop his cruiser before it hit the motorcycle passenger, killing him. *Id*. The passenger's parents brought an action against the officer and his employer alleging a deprivation of the passenger's right to life without due process of law. *Id*. The Supreme Court held that the constitutional right to substantive due process is violated only by governmental action that can properly be characterized as arbitrary, or shocking to the conscience. *Id.* at 1717. Only the most egregious official conduct can be said to be arbitrary in the constitutional sense. *Id*. at 1716. Liability for negligently inflicted harm "is categorically beneath the threshold of constitutional due process." *Id*. at 1718. Conduct that supports a substantive due process claim under section 1983 is conduct "intended to injure in some way

unjustifiable by any government interest." *Id*. Nothing in the plaintiffs' litany of complaints against these defendants supports a conclusion that the defendants intended to injure the plaintiffs.

Indeed, the plaintiffs have offered nothing in the summary judgment record to support a contention that the defendants were deliberately indifferent to their right to liberty. That "mid-level" measure of liability is appropriate in circumstances that, in the language of *County of Sacramento*, are not unforeseen and do not demand an officer's instant judgment. *Id.* at 1720. In the circumstances presented here, the officers did not have the "luxury . . . of having time to make unhurried judgments, upon the chance for repeated reflection, largely uncomplicated by the pulls of competing obligations." *Id*. But the circumstances here also did not demand the split-second judgment demanded of the officer in *County of Sacramento*. At this mid-level on the continuum of abuse of power, the fault, if any, of the defendants does not constitute deliberate indifference to the plaintiffs' liberty and therefore does not meet the "shocks the conscience" test adopted by *County of Sacramento*. Accordingly, the defendants are entitled to summary judgment on Count I of the complaint.

Not all of the incidents included in the plaintiffs' complaint constitute searches or seizures under the Fourth Amendment, which is invoked as the basis for Count II. Only the incidents of August 3, 1995 (involving defendant Young), February 1996 (arrest of David Sawyer by officer not among named defendants), and July 20, 1997 (involving defendants Young, Sanborn and Henckel) present factual scenarios that could possibly involve unreasonable searches or seizures within the scope of the Fourth Amendment, as it has been interpreted by the Supreme Court.[6] Therefore, as an

[6] The plaintiffs contend, in conclusory fashion, that their Fourth Amendment rights were violated in the course of the February 4, 1996 incident by the breaking of the lock on their front door (continued...)

initial matter, defendant Mailman is entitled to summary judgment on Count II, because there are no factual allegations in the summary judgment record that would support a claim against him for violation of the plaintiffs' rights under the Fourth Amendment. Similarly, the summary judgment record establishes, at most, that defendant Henckel remained outside the plaintiffs' residence throughout the July 20, 1997 incident and spoke to David Sawyer after he left the residence. These facts could not possibly provide the basis for a claim that Henckel participated in an unreasonable search or seizure on that occasion. Accordingly, he is also entitled to summary judgment on Count II.

The summary judgment record also fails to provide any evidence that any of the individual defendants was involved in the February 1996 arrest of David Sawyer. The only reference to any of the named defendants in connection with this incident in the plaintiffs' statement of material facts is that an officer, "believed to be Daniel Young, then gave Debra Sawyer and her children a ride home." Plaintiffs' SMF ¶ 14. During this ride, "the police officer said 'that is what you get when you mess with the police.'" *Id.* The citations to the record provided to support this paragraph do not mention defendant Young. The parties are bound by their statements of fact submitted in support of, or in opposition to, a motion for summary judgment and cannot challenge a summary judgment decision based on facts not properly presented therein. *Pew v. Scopino*, 161 F.R.D. 1, 1 (D. Me. 1995). Even if the "belief" to which the entry in the plaintiffs' statement of material fact refers had been appropriately supported, Young's provision of transportation for Debra Sawyer and her children

---

[6](...continued)
as a result of defendant Mailman kicking the door. Plaintiffs' Memorandum at 11. This factual allegation is disputed by the defendants. Mailman Aff. ¶ 3; McLaughlin Aff. ¶ 3. Even if Mailman had kicked and damaged the door, however, that fact does not establish an entry, a search, or a seizure.

and the alleged statement do not constitute searches or seizures within the scope of the Fourth Amendment. Accordingly, based on the record before the court, the arrest cannot provide a basis for any claims against the individual defendants under Count II.

The two remaining incidents involve entries into the plaintiffs' residence. In the absence of consent, the Fourth and Fourteenth Amendments prohibit a warrantless entry into a residence except in exigent circumstances and with probable cause. *Welsh v. Wisconsin*, 466 U.S. 740, 749 (1984); *Buenrostro v. Collazo*, 973 F.2d 39, 43 (1st Cir. 1992). There was no consent to the August 3, 1995 entry by defendant Young, because no one was at home in the plaintiffs' residence. The question whether there was consent to the entry of Young and Sanborn on July 20, 1996 is hotly disputed by the parties. Therefore, my analysis of the qualified immunity issue with respect to the 1996 incident will assume that the defendant officers entered the plaintiffs' residence without consent. The doctrine of qualified immunity entitles a police officer to summary judgment on a claim brought under section 1983 that he violated a plaintiff's Fourth Amendment rights if he could, as a matter of law, reasonably have believed, in the light of clearly established legal principles and the information that he possessed, that his entry was lawful. *Anderson v. Creighton*, 483 U.S. 635, 641 (1987). Evaluation of a qualified immunity claim involves "two analytic components": whether the right asserted by the plaintiff was clearly established at the time of its alleged violation and whether a reasonable official situated in the same circumstances should have understood that the challenged conduct violated that right. *Burns v. Loranger*, 907 F.2d 233, 235-36 (1st Cir. 1990). Here, the right to be free of warrantless entry into one's residence without consent, in the absence of probable cause and exigent circumstances, was clearly established before August 1995. *Welsh*, 466 U.S. at 749; *Payton v. New York*, 445 U.S. 573, 576, 586 (1980). The court's inquiry in this case will thus be

directed toward the second analytic component.

The parties devote far more attention in their written submissions to the July 1996 entry than they do to the August 1995 entry by defendant Young. The defendants emphasize Young's testimony that he only took a few steps inside the front door of the plaintiffs' apartment, believing it to be a common entryway with the Sullivan apartment, and then retreated, went to the back door, and left a card without entering there. Young Aff. ¶¶ 3-4. They argue that this "minimal" intrusion is analogous to cases in which police officers have mistakenly searched the wrong premises. Defendants' Memorandum at 9. However, this argument ignores the fact that the plaintiffs dispute Young's testimony concerning this incident and have submitted evidence, properly supported in the summary judgment record, that suggests that Young actually entered the apartment through the unlocked front door, spent an undetermined amount of time within, and left through the back door. Sullivan Aff. ¶ 2; David S. Dep. at 22. Such an intrusion would be far from minimal.[7] There were no exigent circumstances — the complaint was that a dog was barking inside the apartment — and no police officer could reasonably have believed that his entry into what clearly was a private residence beyond the front stairs would have been legal under the circumstances. Based on the record before the court, Young is not entitled to qualified immunity with respect to this incident.

In discussing the 1996 incident, the plaintiffs emphasize their view that defendant Sanborn

[7] The defendants also argue that Young is entitled to qualified immunity because "Plaintiffs were not home at the time of the event, so they could suffer no damages as a result of this intrusion." Defendants' Memorandum at 9. This assertion is unsupported by any citation to authority. Application of the doctrine of qualified immunity does not involve consideration of the existence of actual damages. In addition, nominal damages have been awarded in section 1983 actions for Fourth Amendment violations. *E.g., Cartwright v. Stamper*, 7 F.3d 106, 107 (7th Cir. 1993) (warrantless entry into apartment); *George v. City of Long Beach*, 973 F.2d 706, 708-09 (9th Cir. 1992) (warrantless arrest).

"conceded" that he did not have probable cause to enter their home, citing pages 43-44 of his deposition. Plaintiffs' Memorandum at [11]. In fact, Sanborn's testimony was as follows:

> Q. Did you, at the time that you were at the Sawyer residence on July 20th, 1997 did you believe that there was probable cause that a crime had been committed?
> A. In the totality of that entire incident did I believe that there was probable cause that a crime had been committed; is that your question?
> Q. Yes.
> A. No, ma'am, otherwise someone would have been arrested or summonsed.

Deposition of Sergeant Christopher Sanborn ("Sanborn Dep.") at 43-44. Sanborn's response is directed to the time after the entry had already been made and not to the time when he made the decision to enter, which is the relevant point in time for purposes of the qualified immunity analysis.[8] In any event, the court is not concerned with the defendant's subjective state of mind in evaluating a qualified immunity defense. *Anderson*, 483 U.S. at 641 ("Anderson's subjective beliefs about the search are irrelevant."); *Hall v. Ochs*, 817 F.2d 920, 924 (1st Cir. 1987). Nor is the question whether the entry was in fact constitutional relevant. *Hegarty*, 53 F.3d at 1373. The test is one of objective reasonableness. *Hall*, 817 F.2d at 924.

Qualified immunity sweeps so broadly that "all but the plainly incompetent or those who knowingly violate the law" are protected from civil rights suits for money damages. *Hunter v. Bryant*, 502 U.S. 224, 229 (1991). "[T]he Supreme Court's standard of reasonableness is comparatively generous to the police in cases where potential danger, emergency conditions or other exigent circumstances are present." *Roy v. City of Lewiston*, 42 F.3d 691, 695 (1st Cir. 1994).

[8] Sanborn also testified that he and Young had the right to be in the plaintiffs' apartment at that time based on "[e]xigent circumstances with a domestic violence situation." Sanborn Dep. at 36.

Exigent circumstances justifying a warrantless entry include emergency situations, such as those in which police "reasonably believe that a person within is in need of immediate aid." *Mincey v. Arizona*, 437 U.S. 385, 392 (1978) ("The need to protect or preserve life or avoid serious injury is justification for what would be otherwise illegal absent an exigency or emergency," quoting *Wayne v. United States*, 318 F.2d 205, 212 (D.C.Cir. 1963)). "[T]he person making entry must have had an objectively reasonable belief that an emergency existed that required immediate entry to render assistance or prevent harm to persons or property within." *United States v. Moss*, 963 F.2d 673, 678 (4th Cir. 1992).

A court considering this issue

> must isolate all reasonably reliable information collectively known to the officers at the time their challenged conduct occurred, *without indulging hindsight*, to determine whether an "objectively reasonable officer," with the identical information, *could* have concluded that there were exigent circumstances sufficient to support an immediate forcible entry.

Hegarty, 53 F.3d at 1375-76 (emphasis in original; citation omitted).

Here, while all three of the officers involved state that they heard loud yelling and screaming when they arrived at the plaintiffs' residence, the plaintiffs contend that they could not have heard any yelling or screaming because "as far as the argument, there was nothing going on when they arrived." Debra S. Dep. at 62. Since Debra Sawyer did not know that police had arrived until they knocked on her second-floor door, it is possible, based on the summary judgment record, that the officers did hear some yelling and screaming upon their arrival at the building. In any event, the plaintiffs do not dispute Henckel's testimony that he also heard loud banging noises from the plaintiffs' apartment upon his arrival. Henckel Aff. ¶ 6; Debra S. Dep. at 62. The plaintiffs also contend that the officers did not know that a juvenile was involved in the loud altercation, but the

portions of the record that they cite in support of this contention do not contradict the officers' statements that they had been informed that a juvenile was involved. Sanborn Aff. ¶ 3; Henckel Aff. ¶ 6. The officers knew that a neighbor had called in to report possible domestic violence at the plaintiffs' apartment. Deposition of Daniel L. Young, Jr. at 55; Sanborn Aff. ¶ 3; Henckel Aff. ¶ 6. The officers do not recall all of the details concerning the call that were conveyed to them before they arrived at the scene, but Henckel recalls that Sanborn requested further details from the dispatcher and believes that the dispatcher relayed to them all of the information that had been provided by the neighbor while they were en route to the scene. Henckel Aff. ¶ 6. This information included the neighbor's statements that she had heard a child "crying in a hysterical manner" and a female voice yelling, including the words "Don't do it, David. Don't do it." Berrill Aff. ¶ 4. The plaintiffs purport to dispute many of these facts in their statement of material facts at paragraph 21, but the portions of the record cited therein do not contradict the officers' sworn statements.

The defendants contend that these factual circumstances would allow an officer reasonably to conclude that exigent circumstances justifying an entry without consent existed when Sanborn and Young approached the plaintiffs' door. A recent decision of the Second Circuit involves a case that is similar on its facts. In *Tierney v. Davidson*, 133 F.3d 189 (2d Cir. 1998), officers responding to a call from an unnamed woman reporting a "bad" domestic dispute found a silent residence with a closed and locked door in which there was a broken pane of glass. *Id.* at 192. As one of the officers approached the residence, he encountered two men who told him that the residence had been the scene of prior domestic altercations, that "this was the worst yet," and that they had heard screaming and banging up until the officer's approach. *Id*. One officer opened the door through the broken pane and entered without knocking or identifying himself. *Id*. The plaintiff then appeared with two

children and, in response to the officer's question, stated that nothing had happened. *Id*. She seemed upset and shaken. *Id*. at 193. The officer proceeded down the stairs into the residence, and the plaintiff told him to leave. *Id*. She then gave him conflicting information in response to his questions and again told him to leave. *Id.* The officer moved the plaintiff out of his way and went into the children's bedroom. *Id.* The second officer then entered the residence and was grabbed and told to leave by the plaintiff's boyfriend. *Id*. A melee involving the plaintiff, the boyfriend, and the officers ensued. *Id*. The boyfriend was charged with impeding an investigation, but the charge was dismissed. *Id.* The Second Circuit found that

> there is little doubt that it was reasonable for [the first officer] to believe that the search was justified by exigent circumstances. [He] had been trained to treat these calls as "priority" and to expect violence in many such disputes. He was responding to what he was told was a "bad" domestic disturbance, the worst yet at this location according to experienced observers; when he arrived at the scene, he was informed by neighbors that the shouting had ended right before his arrival; and as he approached the house, [he] heard nothing and found a broken window pane. It was reasonable for [him] to believe that someone inside had been injured or was in danger, that both antagonists remained in the house, and that this situation satisfied the exigent circumstances exception. Accordingly, [he] is immune from suit for any claims arising from his entry.

Id. at 197.

The plaintiffs argue that *Tierney* is distinguishable because the officer involved met a neighbor who reported the incident, whose credibility he was able to judge; the family had a history of domestic violence by the report of this person; and he saw a broken window.[9] Like the officer in

[9] The plaintiffs also contend that *Tierney* may be distinguished based on the facts that presented themselves after the entry, but it is the warrantless entry itself that is the focus of the analysis here. Sanborn and Young conducted no search after their entry, if indeed Sanborn entered at all, *see* Sanborn Dep. at 30 ("I was either just outside the residence on the landing or just inside the threshold of the door"), nor did they touch anyone, unlike the officers in *Tierney*, but merely (continued...)

Tierney, the defendant officers here had been directed to treat domestic calls as the "highest classification[] of priority." Gorham Police Department Standard Operating Procedure (Domestic Violence), Exh. 1 to Shepard Aff., § IV.C.1. Unlike the officer in *Tierney*, the defendant officers heard loud noises from the plaintiffs' apartment when they arrived. While they found no broken window, they knew that a juvenile had been involved in the shouting. It was reasonable for them to believe that the antagonists remained in the apartment and that someone in the apartment was in danger. The facts in *Tierney*, in the view of the Second Circuit, afforded the officers qualified immunity for actions considerably in excess of those undertaken by the defendants here. On balance, I find the distinguishing factors upon which the plaintiffs rely to be insufficient to deter reliance upon the Second Circuit's conclusions in *Tierney* as persuasive authority. The defendants are entitled to qualified immunity for the July 1996 incident as a matter of law.

To the extent that Counts I and II of the complaint purport to state a claim against the defendant town, the town cannot be liable for the actions of its police officers for which they themselves cannot be held liable. *City of Los Angeles v. Heller*, 475 U.S. 796, 799 (1986). In addition, a town is not vicariously liable for the acts of its employees under section 1983. *Hayden v. Grayson*, 134 F.3d 449, 456 (1st Cir.), *cert. den.* 118 S.Ct. 2370 (1998). The appropriate presentation of claims against a municipality under section 1983 is that made in Counts III and IV of the complaint. *Id*. The town defendant is entitled to summary judgment on Counts I and II.

2. Claims Against the Defendant Town. Count III alleges that the Town of Gorham is liable to the plaintiffs by virtue of a custom or policy of deliberate indifference to violations of individuals'

---

[9](...continued)
refused to leave the premises until they had spoken with Timothy Sawyer.

constitutional rights. Count IV alleges that the town's negligence in supervising, hiring and training its police officers entitles the plaintiffs to recover pursuant to section 1983. The defendants do not address these claims separately in their motion for summary judgment, merely asserting that the town cannot be held liable to the plaintiffs because the individual defendants have not violated any of the plaintiffs' civil rights. Defendants' Memorandum at 13. That point is not established by a finding that the individual defendants are entitled to qualified immunity, even if I had recommended that summary judgment be entered on all claims against them on that basis. A municipality may in fact be held liable under section 1983 for the actions of its employees who are themselves entitled to qualified immunity. *Joyce v. Town of Tewksbury*, 112 F.3d 19, 23 (1st Cir. 1997).

The plaintiffs base Count III on *Monell v. New York City Dep't of Social Servs.*, 436 U.S. 658 (1978), in which the Supreme Court held that municipalities

> can be sued directly under § 1983 for monetary, declaratory, or injunctive relief where, as here, the action that is alleged to be unconstitutional implements or executes a policy statement, ordinance, regulation, or decision officially adopted and promulgated by that body's officers. Moreover, although the touchstone of the § 1983 action against a government body is an allegation that official policy is responsible for a deprivation of rights protected by the Constitution, local governments, like every other § 1983 "person," by the very terms of the statute, may be sued for constitutional deprivations visited pursuant to governmental "custom" even though such a custom has not received formal approval through the body's official decisionmaking channels.

Id. at 690-91. The custom or policy must have caused the constitutional deprivation. *Id*. at 692. Evidence of a single incident is usually insufficient to establish a custom or policy. *St. Hilaire v. City of Laconia*, 71 F.3d 20, 29 (1st Cir. 1995). Here, the plaintiffs offer no evidence of a formally approved policy of the defendant town that could have been the "moving force," *Monell*, 436 U.S. at 694, behind the constitutional deprivations they allege. They rely on the "custom" prong of

Monell.

In the First Circuit, a plaintiff must meet two requirements to maintain a section 1983 action based on an unconstitutional municipal custom.

> First, the custom or practice must be attributable to the municipality. In other words, it must be so well-settled and widespread that the policymaking officials of the municipality can be said to have either actual or constructive knowledge of it yet did nothing to end the practice. Second, the custom must have been the cause of and the moving force behind the deprivation of constitutional rights.

Bordanaro v. McLeod, 871 F.2d 1151, 1156 (1st Cir. 1989) (citations omitted). In *Bordanaro*, there was uncontroverted evidence that the police department had a "longstanding, wide-spread, and facially unconstitutional practice of breaking down doors without a warrant when arresting a felon." *Id*. This practice was attributed to the municipality through the constructive knowledge of the chief of police, due to the widespread nature of the practice and the chief's internal review process that would alert him to practices that transgressed department policy. *Id*. at 1157. The affirmative link between this practice and the constitutional deprivation was established by the evidence that the police officers in this case were following regular police practice. *Id*. at 1158.

I will assume for the purpose of analysis of this issue that the alleged August 3, 1995 entry by Young into the plaintiffs' apartment, the alleged kicking and damaging of the plaintiffs' front door by Mailman on February 4, 1996, David S. Dep. at 27,[10] and the July 20, 1997 entry by Young and Sanborn into the plaintiffs' apartment constituted violations of the plaintiffs' constitutional rights. None of the other incidents alleged by the plaintiffs could possibly rise to the level of a constitutional violation. The plaintiffs offer the following evidence to support their contention that

[10] The defendants deny that any kicking of the door took place. Mailman Aff. ¶ 3, McLaughlin Aff. ¶ 3.

these actions were undertaken as the result of a custom if the Gorham police department: (i) in August 1991 Eugene Willette complained to the Gorham police department that an officer investigating a theft would not leave his property when asked to do so, Exhs. A(1) & A(2) to Affidavit of Cynthia A. Dill, Esq. ("Dill Aff.") (Docket No. 9);[11] (ii) in 1992 defendant Sanborn entered an apartment in the course of an investigation without consent, a warrant, or exigent circumstances and did not immediately state his business to the occupants and was reprimanded for this incident, Exh. B to Plaintiffs' SMF; (iii) on October 31, 1993 a Gorham police officer improperly searched the coat of a minor female for contraband, Exh. B to Dill Aff.; (iv) on August 24, 1995 two Gorham police officers entered the apartment of Misty Credicott by going through an attic between her apartment and an apartment in which they had found the source of loud music that had generated a complaint, but no occupant; Ms. Credicott's complaint was reviewed and determined to be "not founded" by Chief Shepard, Exhs. C(1)-C(4) to Dill Aff.; and (v) in November 1995 Shakir Berry filed a small claims action alleging that a Gorham police officer had removed a radar detector from his truck and had not returned it despite the fact that "police have not proven it to be stolen;" the action was dismissed, Exhs. D(1)-D(3) to Dill Aff. Plaintiffs' Memorandum at 15.

Neither the 1993 search of the minor for contraband nor the 1995 seizure of the radar detector is sufficiently similar to any of the three incidents at issue to provide any basis for a conclusion that it is a custom or practice of the Gorham police to enter private residences without consent or a

[11] Contrary to the representation of the plaintiffs that Willette complained that the officer had entered his property to conduct a search without a warrant, Plaintiffs' SMF ¶ 40, the only evidence in the summary judgment record is that Willette complained that the officer would not leave his property when told to do so and was "unprofessional and harassing [Willette's] son," Exh. A(1) to Dill Aff., and that all searching done by the officer while at Willette's residence was done with his permission, Exh. A(2) to Dill Aff. There is no evidence in the summary judgment record of a warrantless entry without consent in connection with this incident.

warrant or to kick in the doors of a private residence in the course of investigating a complaint of noise.[12] None of the listed incidents is sufficiently similar to the door-kicking incident to provide any basis for a conclusion that such action is a custom or practice of the Gorham police. The two remaining incidents of warrantless entry, one in 1992 and one in 1995, and the refusal to leave private property immediately upon a request to do so in 1991, are insufficient, even when combined with the incidents of which the plaintiffs complain, to establish the kind of persistent, widespread, permanent and well-settled custom or usage contemplated by *Monell*. 436 U.S. at 691. The town is entitled to summary judgment on Count III.

Count IV is based on *City of Canton v. Harris*, 489 U.S. 378 (1989), in which the Supreme Court held that "there are limited circumstances in which an allegation of a 'failure to train' can be the basis for [municipal] liability under § 1983." *Id.* at 387. "[T]he inadequacy of police training may serve as the basis for § 1983 liability only where the failure to train amounts to deliberate indifference to the rights of persons with whom the police come into contact." *Id*. at 388. This is a variant of the *Monell* rule concerning policy or custom. *Id*. at 389. "[I]t may happen that in light of the duties assigned to specific officers or employees the need for more or different training is so obvious, and the inadequacy so likely to result in the violation of constitutional rights, that the policymakers of the city can reasonably be said to have been deliberately indifferent to the need." *Id*. at 390. In that event, the city may be held liable if the lack of training actually causes injury. *Id*.

The plaintiffs present the following evidence to support their claim in Count IV: (i) defendant

---

[12] It is significant that, contrary to the plaintiffs' assertion that they have "been the victim [sic] of three illegal entries into their home without a warrant," Plaintiff's Memorandum at 15, they have submitted no evidence that any officer entered their residence on February 4, 1996, the night of the alleged door-kicking incident.

Young, "even after entering the Sawyers [sic] residence twice without consent or a warrant . . . still does not know the Fourth Amendment from the Second Amendment," Plaintiffs' Memorandum at 16 (referring to Young Dep. at 5-6); (ii) defendant Sanborn erroneously thought exigent circumstances were present when he entered an apartment without a warrant in 1992 and would not immediately explain his presence to the occupants, *id*. (referring to Exh. B to Plaintiffs' SMF and Sanborn Dep. at 14-18); (iii) Sanborn "has a habit of not obtaining" search warrants, *id*.;[13] (iv) since the 1992 incident Sanborn has only attended a risk-management seminar conducted by the town's insurer and another seminar on search warrants, *id*. (referring to Sanborn Dep. at 18-20); (v) Chief Shepard "does not have a good understanding of the limits the United States Constitution places on the activities of police officers," *id*. at 16-17 (referring without further specification to the exhibits to the Dill Aff.); and (vi) the town failed to properly investigate complaints made by the plaintiffs to Chief Shepard, based on the fact that "nothing was done" in response to those complaints, *id*. (referring to David S. Dep. at 40-41, Debra S. Dep. at 29-32, 40, 55-56 and Debra Sawyer's Answers to Interrogatories, number 29 (attached to Plaintiffs' SMF)).

The plaintiffs cite *Comfort* in support of their argument that the town, in addition to providing inadequate training for its police officers, is also liable for failing to supervise those officers.[14] This court held in *Comfort* that a failure by the police chief to properly investigate the events surrounding the plaintiff's need to be hospitalized for injuries consistent with a beating after his arrest and transport to the police station for a breathalyzer test could support a jury finding of

[13] This factual allegation is not appropriately supported in the summary judgment materials submitted by the plaintiffs and will not be considered further.

[14] Count IV of the complaint also alleges gross negligence in the hiring of police officers by the town, but the plaintiffs present no argument on this aspect of their claim.

deliberate indifference. 924 F. Supp. at 1233. Here, the injuries allegedly reported to the chief are much less severe, and the evidence demonstrates that the chief informed the plaintiffs of the necessity to make their complaints in writing, due to the terms of the collective bargaining agreement between the town and the police, and that the plaintiffs never did so. Shepard Aff. ¶ 5. The facts presented here do not rise to the level of "subsequent acceptance of dangerous recklessness by the policymaker" that concerned this court in *Comfort*. This court also held in *Comfort* that the plaintiffs could proceed with a section 1983 claim against the town based on evidence that the police chief's management style "created an atmosphere in which the officers in his command believed that he would not punish their use of excessive force, thus establishing a deliberate indifference." 924 F. Supp. at 1233. If the plaintiffs' reference to Shepard's alleged lack of investigation of their complaints is intended to invoke this aspect of a claim of indifference through lack of supervision, it is also insufficient for this purpose.

The plaintiffs' claim concerning adequate training is a different matter. Here, the plaintiffs rely on *Bordonaro* and *McLain v. Milligan*, 847 F. Supp. 970 (D. Me. 1994), to support their argument. The Supreme Court held in *Canton* that the fact "[t]hat a particular officer may be unsatisfactorily trained will not alone suffice to fasten liability on the city." 489 U.S. at 390. "[P]lainly, adequately trained officers occasionally make mistakes; the fact that they do says little about the training program or the legal basis for holding the city liable." *Id*. at 391. Thus, Sanborn's 1992 error and Young's confusion of the Fourth and Second Amendments, standing alone, do not provide a basis for liability. In addition, "the identified deficiency in a city's training program must be closely related to the ultimate injury." *Id.*

The defendants submit through their statement of material facts uncontroverted evidence that

defendant Young graduated from the Maine Criminal Justice Academy ("Academy") and has received training in Fourth Amendment issues there and in courses at Southern Maine Technical College, Young Aff. ¶ 1; that defendant Sanborn graduated from the Academy and Southern Maine Vocational Technical Institute with a degree in law enforcement, attended in 1994 a seminar sponsored by the Maine Municipal Association regarding Fourth Amendment issues, including warrantless arrests and entry into residences, and attended "numerous in-service training sponsored by the . . . Academy and the Gorham Police Department," Sanborn Aff. ¶ 1; that defendant Mailman graduated from the Academy, Mailman Aff. ¶ 1; and that defendant Henckel graduated from the Academy and received training in Fourth Amendment issues including warrantless arrests and entry into residences through in-service training "while employed by the Town of Gorham" and at the Academy, Henckel Aff. ¶ 1. This recitation suggests that the town's training of its police officers in Fourth Amendment issues is anything but uniform.

The evidence of a lack of appropriate training for police officers was far more extensive in *Bordanaro*, *see* 871 F.2d at 1159-61, than is present here. However, in that case the First Circuit was dealing with an appeal from a jury verdict against the municipality, a situation in which the standard of review varies significantly from the standard applicable to consideration of a motion for summary judgment. One notable similarity between *Bordanaro* and the evidence in the summary judgment record at hand is an apparent lack of mandatory formal training after officers complete their initial police academy courses. *Id*. at 1160. *McLain* is more instructive for purposes of this case. In that case, the issue was an alleged use of excessive force in making an arrest rather than a Fourth Amendment violation, but the requirement that a defendant town make a certain evidentiary showing in order to establish its entitlement to summary judgment on a claim of inadequate training for such

events should not differ based on the nature of the alleged constitutional violation. In *McLain,* this court held that graduation from the Maine State Police Academy and required attendance at refresher courses, in-service training programs, and police specialty courses was insufficient for purposes of summary judgment in the absence of information concerning specific training in the precise area implicated by the events alleged in the complaint. 847 F. Supp. at 978-79. The existence of only an optional videotape and a written policy on the use of force to which an officer might be exposed "could establish an inadequate training policy sufficient for a finding of municipal liability under section 1983." *Id*. at 979. The summary judgment record in this case suggests that some of the town's officers received more than minimal training concerning warrantless entries without consent, but possibly only at their own initiative. That is insufficient as a matter of law to entitle the town to summary judgment on this aspect of Count IV.

C. The State Civil Rights Act Claims

Count V asserts a claim under the Maine Civil Rights Act, 5 M.R.S.A. § 4682, for violation of the plaintiffs' rights under Article 1, Sections 1 and 19 of the Maine Constitution that is analogous to the due process claim raised pursuant to the United States Constitution in Count I. Count VI presents a similar claim under Article 1, Sections 5 and 19 of the Maine Constitution that is analogous to the Fourth Amendment claim raised in Count II. These counts are pressed against all of the defendants. The Maine Civil Rights Act is patterned after section 1983 and employs the same standard for qualified immunity. *Comfort*, 924 F. Supp. at 1236. Accordingly, Sanborn, Mailman and Henckel are entitled to summary judgment on Count VI.

The parties' briefs are less than helpful on the question whether summary judgment on Count I under section 1983 entitles the defendants to summary judgment on Count V under the state statute

as well. The Law Court has not addressed the parallel between the two statutes in a context other than that of the application of the qualified immunity doctrine. However, I conclude from the language of section 4682 and a comparison of the language of Article I, Sections 1 and 19 of the Maine Constitution and the *Sacramento* decision concerning due process rights that it is likely that the Law Court would hold that an action claiming violation of due process rights pursuant to section 4682 would be subject to the same analysis as a federal due process claim under section 1983. Accordingly, the defendants are entitled to summary judgment on Count V. *See Penobscot Area Hous. Dev. Corp. v. City of Brewer*, 434 A.2d 14, 24 n.9 (Me. 1981) (sections of Maine Constitution declaring due process rights are declarative of identical concepts found in Fourteenth Amendment to United States Constitution).

D. Punitive Damages

A municipality is not subject to an award of punitive damages under 42 U.S.C. § 1983 or 5 M.R.S.A. § 4682. *McLain*, 847 F. Supp. at 980. The town is therefore entitled to summary judgment on Count XIII. Defendant Young is the only individual defendant not entitled to summary judgment on all counts. On Count II, a section 1983 claim, punitive damages are available upon a finding that an individual defendant acted with reckless or callous disregard for the plaintiff's rights or an intentional violation of federal law. *Smith v. Wade*, 461 U.S. 30, 51 (1983). Young's alleged entry into the plaintiffs' residence in August 1995 does not rise to this level. On Count VI, the Maine Civil Rights Act claim, punitive damages are available against an individual defendant upon a showing that he acted with malice. *Comfort*, 924 F. Supp. at 1238. Again, Young's alleged entry in 1995 does not rise to this level. *Tuttle v. Raymond*, 494 A.2d 1353, 1361 (Me. 1985).

IV. Conclusion

For the foregoing reasons, I recommend that the defendants' motion for summary judgment be **GRANTED** as to all of the defendants on Counts I, III, V, and VII-XIII; **GRANTED** as to defendants Sanborn, Mailman and Henckel on Counts II and VI; **GRANTED** as to defendant Young on Counts II and VI concerning all events other than the August 1995 entry into the plaintiffs' residence; **GRANTED** as to defendant Town of Gorham on Count II; **GRANTED** as to defendant Town of Gorham on Counts IV and VI concerning all claims other than those arising out of the alleged inadequate training of its police officers regarding application of the Fourth Amendment to the United States Constitution and Article 1, Sections 5 and 19 of the Maine Constitution; and otherwise **DENIED**. If my recommendations are accepted by the court, remaining for trial will be Counts II , VI and XIV against defendant Young, but only as to his alleged entry into the plaintiffs' residence in August 1995, and Counts IV, VI and XIV against defendant Town of Gorham, but only as to its alleged inadequate training of its police officers concerning application of the Fourth Amendment to the United States Constitution and Article 1, Sections 5 and 19 of the Maine Constitution.

NOTICE

A party may file objections to those specified portions of a magistrate judge's report or proposed findings or recommended decisions entered pursuant to 28 U.S.C. § 636(b)(1)(B) for which de novo review by the district court is sought, together with a supporting memorandum, within ten (10) days after being served with a copy thereof. A responsive memorandum shall be filed within ten (10) days after the filing of the objection.

Failure to file a timely objection shall constitute a waiver of the right to de novo review by the district court and to appeal the district court's order.

Dated this 14th day of August, 1998.

David M. Cohen
United States Magistrate Judge